TAY CHEK MENG v. COMPTROLLER OF CUSTOMS, FEDERATION OF MALAYA.

[C. A. (Mathew, C.J., Sir Charles Murray-Aynsley, C.J. (S.) and Wilson, J.) March 2, 1953]

[K.L. — F.M. Civil Appeal No. 77 of 1952]

Excise — Excise Rules — Renewal of licence — Discretion of Comptroller.

In this case the appellant as Managing Director of a Company held a licence to distil liquor in Kuala Lumpur during the year 1952 and had held similar licences for previous years. The licence was due to expire on the 31st December, 1952. During the year 1952 certain discrepancies were discovered between the actual and certified proof strength of samsu relcased from the distillery which resulted in an under-payment of the duty to which such samsu was liable. Additional duty was claimed and paid. It is not suggested that the appellant was personally involved in this under-payment but the company and the appellant only could have benefited directly from it.

Under Rule 6 of the Excise Rules, application for renewal of licences must be made to the Comptroller in writing at least two months before the expiry of the period of licence. By a letter dated the 8th September, 1952, before any application had been made for a renewal of the licence, the appellant was informed by the Senior Assistant Comptroller of Customs, Selangor and Pahang West, that his distillery licence would not be renewed for the year 1953. As a result, a letter of protest was sent by the appellant's solicitors and in reply thereto the Comptroller of Customs stated that he was not at present satisfied as to the character and general suitability of the appellant to continue to hold a licence in respect of the distillery but he stated he was ready to consider any representations which the appellant or the company might wish to offer.

Subsequently, the appellant's solicitor attended at the office of the Comptroller of Customs who listened to everything which the appellant's solicitor had to say on the appellant's behalf. The interview took place on the 6th November, 1952, and by a letter dated the 10th December, 1952, the Comptroller of Customs informed the appellant that he had carefully considered the representations made by Mr. Mills on his behalf but he was not satisfied, in view of the circumstances surrounding the under-payment of duty by the distillery during the year 1951 and early 1952, that he was a suitable person to hold a licence, and in the exercise of his discretion he refused the application for a licence for the year 1953.

The appellant applied by Originating Motion to the High Court for an order in the nature of a mandamus directing the Comptroller of Customs to hear and determine according to law an application by the applicant for a licence for the year 1953. The application was dismissed and now comes before the Court of Appeal on an appeal by the appellant.

Held: the Comptroller exercised his discretion in a judicial manner; (2) it would be improper to intervene in the exercise of the Comptroller's discretion, unless either he has acted arbitrarily and has not given an applicant an opportunity to state his case, or he has exercised his discretion for reasons which, properly, could not be taken into consideration in arriving at his decision.

Cases referred to:—

(1) *R. v. Crewkerne Licensing Justices* 21 Q.B.D. 85 at 87.

(2) *Sharp v. Wakefield* (1891) A.C. 173.

COURT OF APPEAL.

C. Mills, David Marshall and *N. L. Macassey* for the appellant.

A. D. Farrell (Ag. Solicitor General) for the respondent.

Cur. Adv. Vult.

Mathew, C.J. : — This is an appeal against an order dismissing an application for an order in the nature of a mandamus, under the Specific Relief Ordinance, 1950, directing the Comptroller of Customs to hear and determine according to law an application by the applicant for a licence to distil and manufacture intoxicating liquor, under the Excise Enactment (Cap. 133).

The appellant has operated a distillery at Kuala Lumpur since 1942, and continued to be granted a licence in each succeeding year. On the 8th September, 1952 he was informed that his distillery licence would not be renewed. On 24th September the appellant, through his solicitors, protested and asked that he be informed of the reasons for this decision. In a reply dated 16th October, 1952 the Comptroller of Customs said:—

"I have the honour to refer to your letter of 24th September, 1952 on the subject of the decision not to renew Mr. Tay Chek Meng's distillery licence for the year 1953 which was communicated to your client by the Senior Assistant Comptroller of Customs, Selangor and Pahang West, vide the latter's letter No. (35) in CESL. Conf. 4/52. This letter was in fact written at my direction and should have been so phrased.

I am not at present satisfied as to the character and general suitability of the applicant to continue to hold a licence in respect of the distillery and, that being so, I am not prepared in my discretion to renew the licence unless the applicant can satisfy me concerning his suitability.

The grounds on which I am dissatisfied arise out of the circumstances in which there was a serious evasion of duty at the distillery during the year 1951 of which circumstances the applicant and the distillery are well aware and as to which neither the applicant nor the Company has as yet offered any satisfactory explanation.

I will be ready to consider any representation which the applicant or his Company may offer on the subject."

On the 27th October, 1952 the appellant's solicitors replied and asked for an interview with the Comptroller. An interview took place and, on the 10th December, 1952 the Comptroller conveyed to the appellant's solicitors his decision not to issue a licence for the year 1953.

It has been argued on behalf of the appellant that the Comptroller failed to exercise his discretion in a proper manner, and that under the Excise Enactment and the Excise Rules, the appellant is entitled as of right to a renewal of his licence.

The Excise Enactment is purely a revenue collecting Enactment and its purpose, apart from imposing an excise duty, is to ensure that the collection of revenue

which is due is not evaded. It is common ground that duty was under-assessed, and that this under-assessment came about as a result either of the samples on which duty is assessed being tampered with or being incorrectly analysed. There is no suggestion that any irregularity occurred at the distillery.

Section 12(ii) of the Excise Enactment reads :—

"Such licence shall be issued at the discretion of the Comptroller, and only with the consent of the Mentri Besar of the State concerned, and shall be subject to such conditions as may be fixed from time to time by Rule under this Enactment, and to such further conditions as the Mentri Besar may direct to be endorsed on the licence."

Rules 1 and 2 of the Excise Rules are as follows :—

"1. All applications for licences to establish distilleries for the manufacture of intoxicating liquors shall be submitted to the Comptroller and shall be substantially in accordance with the Form Excise No. 1 in the schedule hereto with such variations as the circumstances may require, and each application shall be signed by the applicant.

2. Upon receipt of each application the Comptroller shall make enquiry into:

(a) the suitability of the locality proposed for the distillery;

(b) the suitability of the site proposed, having regard to its immediate surroundings;

(c) the suitability of the building either completed or proposed to be erected, and

(d) the character, solvency and general suitability of the applicant and whether he is connected with any other distillery or with any retail liquor shop or public house."

Rule 3 lays down the building requirements for distilleries.

It is clear that the issue of a licence to distil liquor is in the discretion of the Comptroller, subject only to the consent of the Mentri Besar of the State concerned. The Rules are not as clear as they might be. In my view, rules 1 to 4 are intended to apply only to the consideration of an application for the establishment of a distillery, and specifies certain matters which the Comptroller must consider before he exercises his discretion under section 12(ii) of the Enactment. If, after enquiry, the Comptroller finds that the proposed locality, site and building are suitable, and that the applicant is of good character, solvent and suitable in every other respect, he exercises his discretion under section 12(ii) and issues a licence if the Mentri Besar consents.

The words "if satisfied" in rule 4 appear at first sight to indicate that if the enquiry results in the Comptroller forming a favourable view of the application and the applicant, that he must exercise his discretion in favour of the applicant. But I think the words in para (d) :—

"and whether he is connected with any other distillery or with any retail liquor shop or public house"

clearly show that the purpose of the rule is to direct the attention of the Comptroller to certain matters into which he must enquire before exercising his discretion to issue a licence for the first time. The applicant may or may not be connected with another distillery, retail liquor shop or public house. If he is, the Comptroller must enquire into his connection with them and form a view favourable or otherwise to the applicant. In my view, the matters under rule 2 to which the Comptroller must direct his attention before exercising his discretion are not exhaustive, and do not limit the exercise of his discretion under section 12(ii) of the Enactment. The words "if satisfied" can only mean "if satisfied that his discretion should be exercised".

Whether an application be a first application or an application for a further licence, the Comptroller has a discretion to exercise under the Enactment, and it cannot seriously be argued that if there are considerations which are relevant in considering an application for an original licence, that they are irrelevant when considering a fresh grant. The suitability of an applicant for the grant of a licence must always be present in the Comptroller's mind when exercising his discretion.

It has been argued that as the Comptroller has granted the appellant a licence for 1953 in respect of his Raub distillery, he must have been satisfied that the appellant was a fit and proper person to have a licence, and that therefore he should not have refused a licence for the Kuala Lumpur distillery. I do not think that the grant of a licence for the Raub distillery carries the matter any further. The Comptroller exercised his discretion in the appellant's favour, no doubt, bearing in mind that he had no reason to believe that there had been any irregularities in connection with the full collection of revenue from that distillery in the year that had passed. If anything, the Comptroller erred in favour of the appellant in the exercise of his discretion.

There was considerable argument over the meaning of rule 6. It was contended for the appellant that a licensee was entitled to a renewal if he submitted his application within the prescribed time and paid the licence fee. I agree with the learned Solicitor-General that the word renewal has no special significance. As Lindley, L.J., said in *R. v. Crewkerne Licensing Justices*[1] :—

"What is the meaning of applying for a renewal of a licence? It can only mean that the licence-holder is applying to renew that which is in existence and is on the point of expiry."

The licence of the appellant expired on 31st December, 1952, and nothing but the grant of a new licence for a further period could authorise his continued distilling of alcoholic liquor. Rule 6 provides only that an

application for a licence must be made two months before the expiry of the existing licence. The words :—

"and renewal shall be conditional upon such conditions as the Comptroller with the approval of the Mentri Besar may deem fit to impose"

are surplusage, as provision to impose conditions is contained in section 12 (ii) of the Excise Enactment. The Comptroller in exercising his discretion must be influenced by considerations of safeguarding the revenue.

There had been under-payments of duty in respect of the appellant's Kuala Lumpur distillery, and he had to ask himself, when considering the renewal of the licence, whether he should exercise his discretion in favour of the appellant.

The appellant was informed of the reasons on which the Comptroller intended to base his refusal to renew the licence for Kuala Lumpur. He was given an opportunity to discuss the matter with the Comptroller through his solicitors, and it was only after this interview, and having considered further representations on behalf of the appellant, that he came to his decision of the 10th December 1952. His decision not to renew the licence was arrived at after the appellant had been able to represent his case fully and the Comptroller had considered his representations.

In my view, it would be improper to intervene in the exercise of the Comptroller's discretion, unless either he has acted arbitrarily and has not given an applicant the opportunity to state his case, or he has exercised his discretion for reasons which, properly, could not be taken into consideration in arriving at his decision.

Was he entitled to take into consideration that, although the tampering with the samples had taken place outside the control of the appellant, the only person who could benefit from the resulting wrong calculation of duty was the appellant? In my view he could. How this tampering occurred has not been discovered, but it happened over a considerable period and might, but for the advent of a new customs official, never have been discovered.

His duty was to protect the revenue, and he came to the conclusion that it would not be proper for him to renew the appellant's licence. I cannot say, in the words of Halsbury, L.C., in *Sharp v. Wakefield*[2], that the Comptroller did not exercise his discretion :—

"Within the limit, to which an honest man competent in the discharge of his office ought to confine himself."

I would accordingly dismiss this appeal with costs.

Sir Charles Murray-Aynsley, C.J., (S.) : — I have had the opportunity of reading the judgment of the learned President of the Court with which I concur and have nothing to add.

Wilson, J. [after stating the facts as in the headnotes above, continued] : — Section 12 (ii) of the Excise Enactment reads as follows :—

"Such licence shall be issued at the discretion of the Comptroller and only with the consent of the Mentri Besar of the State concerned, and shall be subject to such conditions as may be fixed from time to time by Rule under this Enactment, and to such further conditions as the Mentri Besar may direct to be endorsed on the licence."

Our attention has also been drawn to the Excise Rules and, in particular, to rules 1, 2, 3 and 4. These particular rules apply only to applications for licences to establish distilleries. They do not apply, in my opinion, to applications for the renewal of licences previously issued to distilleries which have been established. But I would observe that, in my opinion, they do not in any way lessen the discretion given to the Comptroller under section 12 (ii). They appear to me to be directions to the Comptroller as to certain matters which he is required to consider on receiving an application for a licence to establish a distillery.

It is necessary, therefore, I think, to consider only what is the discretion granted to the Comptroller under section 12 (ii). In *Sharp v. Wakefield*[2], Lord Halsbury at page 179, dealing with an application under the English law to justices for the renewal of a licence for the sale of intoxicating liquors, stated as follows :—

"An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and 'discretion' means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion; according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself."

It would appear to me that what we have to do in this case is to consider whether the Comptroller has properly exercised the discretion which is given to him by section 12 (ii). In doing so, I do not think it was necessary for him to confine himself to such matters as he is ordered to enquire into under the Excise rules on applications for licences to establish distilleries. It is clear from his affidavit dated the 23rd December, 1952, that the appellant's legal adviser had full opportunity of making representations to the Comptroller and in fact did so at the interview of the 6th November, 1952. It is also clear that the Comptroller gave these representations on the circumstances of the

application further careful consideration but he states he was still not satisfied the applicant was a suitable person to be the holder of a licence.

In my view, the Comptroller exercised his discretion in a judicial manner. Although the appellant himself was never charged with any offence under the Excise Enactment, and although it was never suggested that he himself was responsible for the under-payment of duty, which undoubtedly if not discovered would have benefited the appellant. I think that as the appellant was nevertheless responsible for the running of the distillery the Comptroller was entitled in his discretion to come to the conclusion that he was not a suitable person to have his licence renewed.

Subsequent to the letter of the 10th December, 1952, the appellant was granted a renewal of a licence to carry on a distillery at Raub. It is suggested that if he is a fit person to carry on a distillery at Raub he must be a fit person to be the licensee of a distillery in Kuala Lumpur. I do not think that is necessarily so. There has been no complaint about the distillery at Raub and one must assume that it is conducted in a proper way. Further, the licence for the Raub distillery has been granted only for a period of six months with an intimation that in any event it will not be renewed after the end of 1953. I would dismiss this appeal with costs.

Appeal dismissed.

P. KANDIAH v. R.

[A. Cr. J. (Sir Charles Murray-Aynsley, C.J.)

March 6, 1953]

[Singapore — Magistrate's Appeal No. 181 of 1952]

Penal Code, ss. 191 and 193 — Giving false evidence — Statement made to police officer — Criminal Procedure Code (Cap. 21), s. 123(2).

In this case the appellant had been convicted of giving false evidence punishable under section 193 of the Penal Code. It appeared that the appellant made a statement to the Police in the course of an investigation and later when giving evidence in the course of a criminal trial, differed materially from what he said before. The two versions of the facts could not be reconciled, but there was no evidence to show which of the two statements was true and he was charged in the alternative. The statement to the Police was recorded in narrative form and did not record the actual questions and the answers thereto.

Held: (1) section 123(2) of the Criminal Procedure Code imposes an obligation on the person giving a statement to answer truly all questions relating to the case under investigation; (2) as the statement in this case was taken in narrative form it could not form the basis of a charge under section 191 of the Penal Code.

CRIMINAL APPEAL.

K. A. Seth for the appellant.

A. H. Simpson (Crown Counsel) for the Crown.

Sir Charles Murray-Aynsley, C.J. : — In this case the appellant was convicted of giving false evidence, punishable under section 193 of the Penal Code. The circumstances were that the appellant made a statement to the Police in the course of an investigation and later, when giving evidence in the course of a criminal trial, differed materially from what he said before. The two versions of the facts cannot be reconciled, but there is no evidence to show which of the two statements was true and he was charged in the alternative.

The statement in the course of the Police investigation was, of course, not on oath and can only be punished as false evidence if the appellant was "bound by law" to make a declaration on any subject. The obligation on the appellant is imposed by section 123 (2) of the Criminal Procedure Code. "Such person (this, in the circumstances, would have included the appellant) shall be bound to answer truly all questions relating to such case put to him by such officer." In the present case certain questions were put to the appellant but what he said was taken down in narrative form and it is not known what the questions were. It cannot, therefore, be certain that any statement of fact that appears in the narrative was actually the answer to a question. As a consequence, apart from the question as to whether the obligation to answer a question can be included in the obligation to make a declaration, the narrative as taken down cannot form the basis of a charge under section 191.

The appeal must be allowed and the conviction quashed.

Appeal allowed.

Conviction quashed.